



ratings of Drs. Murati and Stein, finding claimant sustained a 10.5 percent permanent functional impairment of the right forearm and a 12.5 percent permanent functional impairment to the right shoulder.

Claimant argues the ALJ erred by disregarding Dr. Fluter's opinions and discounting Dr. Murati's opinions. Claimant contends he expressed neck, right shoulder or right arm complaints to every physician he saw, and his neck injury was documented by MRIs, EMGs, injections and the diagnoses of multiple physicians. Claimant maintains respondent terminated claimant's employment, and he is therefore entitled to permanent partial disability (PPD) benefits based on a 75.5 percent work disability. Claimant requests the Board reverse the Award.

Respondent argues Drs. Fluter and Murati are "claimant oriented," casting doubt on their credibility. Respondent also asserts Dr. Stein possesses a reputation of moderation, reasonableness and objectivity. Respondent contends Dr. Fluter's impairment rating is suspect because it was based on an examination that occurred over a year before his rating, thus rendering his opinions lacking in credibility. Respondent requests the Board affirm the ALJ's findings.

The issue before the Board is: what is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT**

Claimant began working for respondent in January 1993. On the date of his May 21, 2009, accident, he was employed as an Agricultural Inspector II, a position requiring inspection of facilities. Claimant's job duties included driving throughout the state; performing "search and seizure"<sup>4</sup> procedures; inspecting grounds and animals; capturing, transporting, housing, caring for and disposing of animals; taking notes and photographs; and writing reports. According to claimant, his job required extensive standing, walking, running, stooping, lifting, carrying, bending, twisting, scraping and grinding.

Claimant testified that on May 21, 2009, his work pickup truck had a flat tire. While on his back under the vehicle removing the spare tire, the tire fell, striking the right side of his head and knocking him to the pavement. Claimant testified he injured the right side of his head, back, neck, right shoulder, right wrist and the fingers on his right hand.

According to claimant, respondent sent him to Dr. Dobyms, who saw claimant initially on May 21, 2009. He and the doctor discussed his right shoulder and right arm injuries. Dr. Dobyms examined claimant and ordered a right shoulder MRI scan. Claimant was referred to Dr. Osland, an orthopedic surgeon, for evaluation. Claimant testified the

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<sup>4</sup> R.H. Trans. at 9.

shoulder MRI showed “a tear of some sort.”<sup>5</sup> Dr. Osland placed claimant’s right arm in a sling.

Claimant testified he continued performing his regular job and did not receive treatment for six to eight months. Claimant asserted that during that time, his right arm, right shoulder and neck worsened. According to claimant, his pain became more prevalent, intense and severe, and he experienced headaches and tremors.

Claimant testified he returned to Dr. Dobyns in March 2010, with complaints of neck, right shoulder and right arm pain. Claimant asserted he was diagnosed with carpal tunnel syndrome. Dr. Dobyns ordered an MRI scan of claimant’s neck.

Although Dr. Do did not testify, the record indicates he provided authorized treatment, including a right shoulder arthroscopy with debridement, and subacromial decompression and rotator cuff repair on December 6, 2010. Dr. Do also performed a right carpal tunnel release on March 28, 2011. Claimant testified Dr. Do provided therapy and injections for his neck. According to claimant, Dr. Do and the rehabilitation clinic staff told him to wear a sling and wrist wrap. Dr. Do released claimant with restrictions.

Claimant testified he was sent to Dr. Kris Lewonowski for treatment of his neck. Dr. Lewonowski ordered an EMG of his right upper extremity and prescribed injections to claimant’s neck. A July 26, 2010, MRI of the cervical spine showed annular disk bulging at C4-5, C5-6, and C6-7 with bilateral foraminal encroachment. The EMG also revealed right C6-7 acute radiculopathy. On September 3, 2010, claimant underwent a right C5-6 and C6-7 transforaminal epidural steroid injection.

Following treatment, claimant returned to respondent performing his regular job until March 1, 2013. According to claimant, his condition worsened over time. Claimant testified he was unable to grasp or maintain stability or strength with his right upper extremity. Claimant asserted he experienced headaches and neck pain and was unable to fully perform his job tasks. Respondent terminated claimant’s employment on March 1, 2013. Claimant testified he was told he was terminated because of his inability to perform his job duties.

George G. Fluter, M.D., a board certified physician, examined claimant at his attorney’s request on May 23, 2013. Dr. Fluter testified claimant reported neck, upper back, right shoulder, right arm and lower back pain. Claimant complained of numbness in his right hand, fingers and thumb, weakness in his right hand and neck, and sharp pain in his neck.

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<sup>5</sup> *Id.* at 13.

Dr. Fluter's diagnostic impressions were status post work-related injury on May 21, 2009; neck/upper back pain; cervicothoracic strain/sprain; right shoulder/upper extremity pain; right shoulder impingement/tendonitis/bursitis; right shoulder internal derangement; status post right shoulder surgery, December 6, 2010; right C6-7 radiculopathy; low back pain; left L3-4 radiculopathy; and status post lumbar spine surgery on two occasions, March 2, 2000, May 28, 2003.

Dr. Fluter imposed restrictions of no lifting, carrying, pushing or pulling in excess of 20 pounds occasionally and 10 pounds frequently; avoiding awkward and extreme positions of the head and neck; and limiting the following activities to occasionally only with the right arm: working above shoulder level, working more than 24 inches away from the body and repetitive grasping, flexion and extension. The doctor also recommended avoiding the use of power/vibratory tools.

Dr. Fluter generated a report dated August 29, 2014, without re-examining claimant. Dr. Fluter rated claimant at 31 percent to the whole body including the lumbar spine. Without the lumbar spine, Dr. Fluter rated claimant at 15 percent to the whole body for the cervical spine and 9 percent to the whole body for the right upper extremity (10% to the right upper extremity for the right wrist and 5% to the right upper extremity at the shoulder), for a total of 23 percent impairment to the whole body.

Dr. Fluter reviewed the work task assessment prepared by vocational consultant Paul Hardin. Dr. Fluter testified claimant could not perform 16 of the 35 tasks for a 46 percent task loss. Removing the tasks related to the low back, Dr. Fluter opined claimant could not perform 13 of the 35 tasks, for 37.14 percent task loss.

Pedro A. Murati, M.D., a board certified rehabilitation and physical medicine doctor, evaluated claimant at his counsel's request on April 15, 2014. Dr. Murati testified claimant complained of difficulty using his right upper extremity due to weakness; constant pain and numbness in his right upper extremity up into the neck and upper back; numbness and tingling in the right upper extremity; increased pain in the right upper extremity in cold weather; increased low back pain since his accident; and dropping things with the right upper extremity.

Dr. Murati diagnosed: 1) status post right shoulder arthroscopy with extensive debridement of the glenohumeral joint, including the labrum, chondroplasty of the glenoid, undersurface of rotator cuff, and base of the biceps; right shoulder; 2) arthroscopic subacromial decompression, and right shoulder arthroscopic rotator cuff repair; 3) status post right carpal tunnel release; 4) cervical radiculopathy; 5) myofascial pain syndrome of the right shoulder girdle extending into the cervical and thoracic paraspinals; and 6) aggravation of preexisting low back injury status post fusion.

Dr. Murati imposed restrictions of: no lifting more than 10 pounds occasionally and five pounds constantly; no bending, crouching and stooping; no climbing ladders or crawling; no repetitive grasping or heavy grasping with the right hand; no above-shoulder-level work with the right upper extremity; rarely climb stairs or squat; only occasional sitting, standing, walking, driving and use of repetitive hand controls; no work more than 24 inches away from the body on the right; avoid awkward positions of the neck; alternate sitting, standing and walking as needed; avoid trunk twisting; no use of hooks or knives; no keyboarding; no use of vibratory tools on the right; rest every two hours for 30 minutes or 30 minutes rest after one and a half hours of work. Dr. Murati testified he felt claimant was essentially and realistically unemployable.

Dr. Murati testified his diagnoses of claimant's various conditions were a direct result of his May 21, 2009 accident.

Dr. Murati rated claimant's right upper extremity at 11 percent for the right forearm and 19 percent to the extremity for the right shoulder. Dr. Murati's total rating for was 36 percent impairment to the whole person for all of his conditions. Dr. Murati's aggregate rating would be 32 percent to the body if the low back is excluded. Dr. Murati testified he reviewed Paul Hardin's task list and opined claimant has an 88 percent task loss.

Paul Stein, M.D., a licensed medical doctor specializing in neurological medicine and surgery, evaluated claimant at respondent's request on August 21, 2014. Dr. Stein rated claimant's permanent impairment of function at 6 percent to the right upper extremity at the shoulder, and 10 percent to claimant's right upper extremity at the wrist. Dr. Stein had difficulty relating claimant's alleged cervical spine injury to his work accident because claimant's neck complaints were significantly delayed as reflected in the treatment records. Dr. Stein found claimant could not perform 13 of the 35 work tasks identified by Mr. Hardin, for a 37 percent task loss.

Claimant complained of neck pain to Drs. Lewonowski, Do, Fluter and Murati. Claimant's MRI scan of the cervical spine on July 26, 2010, showed disc bulges at C4-5, C5-6 and C6-7. Dr. Stein opined the MRI revealed degenerative changes typical of most 62 year old men.

Paul S. Hardin, a vocational consultant, performed a task performance capacity assessment claimant on May 8, 2014, at the request of claimant's counsel. He identified 35 work tasks claimant performed in the 15 year period preceding the accident.

Claimant's pre-injury wage was \$1,289 and his current wage was \$430, a difference of \$859, for a 67 percent wage loss.

Claimant testified that since his injury, he cannot grasp or maintain a grasp on something without constant force. He cannot hold a pencil without concentrating on it or it will drop. Claimant cannot determine the strength or amount of pressure he is using on

objects, such as holding a pencil, washing his hands, typing, driving, taking photographs or handling animals. Claimant asserts he has pain, irritation and discomfort in his shoulder and wrist that limit his work. Claimant also testified he has severe numbness in his fingers, tingling, with pain radiating up his arm and shoulder into his neck, with headaches; he does not get more than two hours of sleep at a time; he has severe pain when he wakes; he must schedule activities around taking pain medications and must see the doctor once per month for the medications; he has stiffness and soreness and excruciating pain at all times.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Board finds the reasoning set forth in the Award is persuasive and the Board accordingly adopts the ALJ's findings of fact, as supplemented by the above findings, and conclusions of law, all of which are amply supported by a preponderance of the credible evidence. The Award contains the following language:

As noted above, three different physicians provided testimony on their opinions regarding the nature and extent of Claimant's permanent impairment: Dr. Fluter, Dr. Murati, and Dr. Stein. All three physicians were hired by either Claimant or Respondent to render their opinions for purposes of litigation. None of them actually provided treatment for Claimant's injuries. All three physicians were in agreement that Claimant sustained some degree of permanent impairment in his right wrist and right shoulder as a result of his work accident. Their findings in this regard are supported by the fact that Claimant reported right upper extremity injuries immediately after his May 21, 2009, accident, and he underwent significant treatment, including surgery on both of his right shoulder and right wrist for his injuries.

The physicians disagree on the question of whether Claimant sustained any permanent impairment to his neck or cervical spine related to his work accident. Dr. Fluter and Dr. Murati both opined that Claimant has permanent impairment in his cervical spine related to his work injury. Dr. Stein, on the other hand, did not relate any permanent impairment in Claimant's cervical spine to his work accident.

Dr. Fluter examined Claimant in May 2013, which was almost a year prior to the examinations done by Dr. Murati and Dr. Stein and prior to his release from medical treatment. Although Dr. Fluter issued his opinions regarding Claimant's permanent impairment and restrictions in August 2014, he did so based on his stale examination of Claimant from more than a year prior. As such, the Court finds the opinions of Dr. Fluter to be less credible than those of the other physicians that examined Claimant.

In weighing the opinions of Dr. Murati and Dr. Stein, the Court finds the opinions of Dr. Stein regarding the causation of Claimant's neck complaints to be more persuasive than those of Dr. Murati for several reasons. First, Dr. Stein is a board certified neurosurgeon; whereas, Dr. Murati is board certified in rehabilitation

and physical medicine. Dr. Stein's opinion that Claimant did not sustain injury to his cervical spine that was causally related to his work accident is also supported by the evidence in the record. Claimant testified that he did not have any neck complaints prior to his work accident but that he developed neck symptoms after his accident. Claimant admitted, however, that he did not report neck pain symptoms to his treating physicians until he saw Dr. Dobyns in March 2010, approximately 10 months after his work accident. Additionally, Dr. Stein noted that Claimant denied neck pain when he saw Dr. Dobyns on March 11, 2010. Finally, Dr. Stein concluded that the positive findings on Claimant's MRI were all degenerative in nature. Based on the foregoing, the Court finds that Claimant did not sustain permanent injury to his neck or cervical spine related to his May 21, 2009, work accident.<sup>6</sup>

The Board also adopts the ALJ's finding regarding the permanent impairment to claimant's right shoulder and right forearm. The ALJ and the Board considered all evidence in the record and weighed the credibility of all witnesses.

#### **CONCLUSION**

The Board finds claimant's permanent impairment related to the May 21, 2009, accident does not include the cervical spine. Claimant sustained a 10.5 percent permanent functional impairment of the right forearm and a 12.5 percent permanent functional impairment to the right shoulder.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Ali Marchant dated February 11, 2015, is affirmed in all respects.

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<sup>6</sup> ALJ Award (Feb. 11, 2015) at 7-8.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Ali Marchant, Administrative Law Judge